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IN THE
COURT OF APPEALS OF INDIANA

THOMAS MCDONNELL,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 49A02-0606-CR-545
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Tanya Walton Pratt, Judge
Cause No. 49G05-9712-CF-164581

April 4, 2007

MEMORANDUM DECISION – NOT FOR PUBLICATION

RILEY, Judge

STATEMENT OF THE CASE

Appellant-Defendant, Thomas McDonnell (McDonnell), appeals his sentence for voluntary manslaughter, a Class A felony, Ind. Code § 35-42-1-3.

We affirm.

ISSUE

McDonnell raises one issue on appeal, which we restate as follows: Whether the trial court abused its discretion in sentencing McDonnell to an aggravated sentence of thirty-five years.

FACTS AND PROCEDURAL HISTORY

In the early morning hours of October 4, 1997, McDonnell and his wife, Elizabeth Hisle McDonnell (Hisle), were sleeping on the pull out sofa in the home of Harvey Bridgeford (Bridgeford). At some point, McDonnell awoke to find Dennis Daniels (Daniels), who was renting a room from Bridgeford, fondling his wife's breast. McDonnell, Hisle, and Daniels had all been drinking throughout the previous evening and on into the morning. When McDonnell saw Daniels fondling his wife, he went into a rage and began hitting Daniels in the head and body with a mop, as well as kicking him. McDonnell admits that he hit Daniels somewhere between five and ten times with the mop. Michael Allen (Allen), a forensic pathologist, testified that according to observing the body post mortum, Daniels had sustained at least fifteen blows from either the mop or from kicking. McDonnell claims that he was using the mop instead of his hands since he had injured his hand several weeks before. After the beating ceased, McDonnell and his wife fled Indiana and continued on a cross country trip for the next

two months. On December 14, 1997, McDonnell and his wife were arrested in Hancock County.

On December 15, 1997, the State filed an Information charging McDonnell with Count I, murder, I.C. § 35-42-1-1(1). On July 20, 1998, the State amended the charging Information to include Count II, felony murder, I.C. § 35-42-1-1(2) and Count III, robbery, I.C. § 35-42-5-1. On February 11, 1999, McDonnell pled guilty to voluntary manslaughter, I.C. § 35-42-1-3, in exchange for the State's dismissal of other charges. On April 16, 1999 and May 6, 1999, the sentencing hearing was held in which the court imposed a sentence of thirty-five years.

McDonnell now appeals. Additional facts will be provided as necessary.

DISCUSSION AND DECISION

McDonnell contends that his enhanced sentence of thirty-five years is not appropriate. Specifically, McDonnell maintains the trial court improperly determined (1) there was a high risk McDonnell would commit another crime, (2) the nature and circumstances of the crime believed to aggravate the sentence were elements of the crime and (3) the statement by the victim's family was improperly relied on as an aggravating factor. McDonnell further alleges that the presence of mitigating factors, when weighed against the aggravating factors, renders the imposed sentence inappropriate.

I. *Standard of Review*

At the outset, we note that sentencing decisions are within the trial court's discretion, and will be reversed only upon a showing of abuse of discretion. *Powell v.*

State, 751 N.E.2d 311, 314 (Ind. Ct. App. 2001). The trial court's sentencing discretion includes the determination of whether to increase presumptive penalties. *Madden v. State*, 697 N.E.2d 964, 967 (Ind. Ct. App. 1998), *trans. denied.* In doing so, the trial court determines which aggravating and mitigating circumstances to consider, and is solely responsible for determining the weight to accord to each of these factors. *Perry v. State*, 751 N.E.2d 306, 309 (Ind. Ct. App. 2001). The sentencing statement must: (1) identify significant aggravating and mitigating circumstances; (2) state the specific reason why each circumstance is aggravating and mitigating; and (3) demonstrate that the aggravating and mitigating circumstances have been weighed to determine that the aggravators outweigh the mitigators. *Powell*, 751 N.E.2d at 315. We examine both the written sentencing order and the trial court's comments at the sentencing hearing to determine whether the trial court adequately explained the reasons for the sentence. *Id.* A sentence enhancement will be affirmed, if after due consideration of the trial court's decision, this court finds that the sentence was appropriate in light of the nature of the offense and the character of the offender. *See* App. R. 7(B); *Rodriguez v. State*, 785 N.E.2d 1169, 1174 (Ind. Ct. App. 2003), *trans. denied.*

II. *Imposition of an Enhanced Sentence*

First, McDonnell argues that the trial court improperly relied on three aggravating factors to enhance his sentence above the presumptive. In support of its sentence, the trial court noted the following aggravating factors during the sentencing hearing: (1) the risk that McDonnell will commit another crime, (2) the brutal nature of the crime, and (3) the statements made by the victim's family. McDonnell further argues that an

enhanced sentence is improper when weighing these aggravators with the mitigators. As mitigating factors, the trial court considered (1) McDonnell's lack of a significant criminal history, (2) the hardship on McDonnell's dependents if he is given a long term of incarceration, and (3) McDonnell's remorse.

In the present case, McDonnell received thirty-five years for voluntary manslaughter, a Class A felony. The presumptive sentence for a Class A felony is thirty years, with not more than twenty years added for aggravated circumstances and not more than ten years subtracted for mitigating circumstances. *See* I.C. § 35-50-2-4.

A. *Aggravating Circumstances*

First, McDonnell contends that the trial court improperly relied upon the statement of the victim's family to enhance his sentence. The State concedes and we agree. While recommendations from victims or their representative "may properly assist a court in determining what sentence to impose," they are not proper aggravating or mitigating factors. *Haddock v. State,* 800 N.E.2d 242, 247 (Ind. Ct. App. 2003). There is a presumption that the legislature took into account the emotional or psychological impact on the victim when it set the presumptive sentence. *Thompson v. State*, 793 N.E.2d 1046, 1053 (Ind. Ct. App. 2003). Because of this presumption, the impact on the victim is not an appropriate aggravating factor "unless the impact, harm or trauma is greater than usually associated with the crime." *Id*. at 598. In this case there is no evidence that the harm or trauma on the family of the victim is any greater than that which normally accompanies a crime of voluntary manslaughter.

Second, the risk that McDonnell would commit another crime was used as an aggravator to enhance his sentence. The trial court notes McDonnell's history of battery, his killing of Daniels in a rage, the continuing battery of his wife after the killing, and his continuing alcohol abuse after the killing as indicators that McDonnell posed a risk of committing another crime. Of these factors, the trial court's consideration of the rage with which he committed the crime was improper. "A fact which comprises a material element of a crime may not also constitute an aggravating circumstance to support an enhanced sentence." *Stewart v. State*, 531 N.E.2d 1146, 1150 (Ind. 1988). Voluntary manslaughter requires "a person who knowingly or intentionally (1) kills another human being . . . while acting under sudden heat." I.C. § 35-42-1-3. Sudden heat is defined as "anger, *rage*, resentment, or terror sufficient to obscure the reason of an ordinary person, preventing deliberation and premeditation, excluding malice, and rendering a person incapable of cool reflection." *Brown v. State*, 751 N.E.2d 664, 671 (Ind. 2001) (Emphasis added). Because the rage present in the situation made the crime applicable as voluntary manslaughter instead of murder, it is an element of the crime and an improper factor to be used to increase the sentence above the presumptive. However, evidence introduced at the trial court indicated that McDonnell had a past history of battery that could be directly linked to his abuse of alcohol. Even after this alcohol abuse led him to kill Daniels, the battery and the alcohol abuse continued. Although McDonnell claims that he has been sober since his incarceration despite the availability of alcohol, it is still a reasonable concern of the trial court that if he were to be released with a much easier access to alcohol, his alcohol abuse would recur.

The last aggravating factor considered by the court was the nature and circumstances of the crime. The trial court considered the nature and circumstances of the crime to be an aggravator due to the brutal nature of the crime. The record reflects that Daniels sustained a number of blows inflicted with the use of two mops. The use of two mops is actually an element of the crime. Voluntary manslaughter becomes a Class A felony when "it is committed by means of a deadly weapon." I.C. §35-42-1-3. Therefore, it would be improper to consider this to be an aggravator as it was already taken into account in determining the presumptive sentence for a Class A felony. However, a second part of what makes this crime particularly brutal is the number of blows that were inflicted upon Daniels. In *Hightower*, the Indiana Supreme Court upheld the trial court's determination to increase the sentence above its presumptive due to the particularly brutal nature of the offense. *Hightower v. State*, 422 N.E.2d 1194, 1197 (Ind. 1981). Here, McDonnell admitted to hitting Daniels with the mop "[p]robably about ten times" as well as kicking him. (Transcript p. 16). Also Allen, a forensic pathologist, testified that his observation of the body post mortem indicated at least fifteen blows from either the mop or kicking.

Even though one factor was improperly considered by the trial court as an aggravator, the court of appeals can "affirm the sentence if it can say with confidence that the same sentence is appropriate without it." *Witmer v. State*, 800 N.E.2d 571 (Ind. 2003). Further, despite the fact that the other two factors contained elements that were improper, we conclude that the enhanced sentence was still proper. It has previously

been held that a single aggravating circumstance can be sufficient to support the imposition of an enhanced sentence. *Haddock*, 800 N.E.2d at 245.

B. *Mitigating Circumstances*

Next, McDonnell contends that the presence of two mitigating factors when weighed with the remaining aggravating factors renders the enhanced sentence invalid. While the "court should consider all proffered mitigating circumstances," it has the ability to recognize only those mitigators it finds significant and need only give them the weight it finds proper. *Sensback v. State*, 720 N.E.2d 1160, 1163 (Ind. 1999). In this case, we find that the record clearly supports the trial court's consideration of possible mitigating circumstances. In this case, the trial court did give weight to McDonnell's lack of criminal history. When considering criminal history, the trial court can look to felony convictions, misdemeanor convictions and "other prior criminal activity which has not been reduced to a conviction but which does indicate a prior criminal history." *Simmons v. State*, 746 N.E.2d 81, 93 (Ind. Ct. App. 2001). Due to the fact that McDonnell had a criminal history including a misdemeanor DUI, an arrest for beating his wife, and an arrest for public intoxication, it was proper for the trial court to not give this mitigating factor much weight. The court also considered the detrimental effect a long prison term would have on McDonnell's dependents and his remorse as mitigating factors but was not required to give them the same weight McDonnell would have. *See Sensback*, 720 N.E.2d at 1163. Therefore, under these circumstances, we find that the trial court did not abuse its discretion in finding that McDonnell's proffered mitigators were outweighed by the aggravators.

C. *Weighing of Aggravators and Mitigators*

In the instant case, it is our determination that the trial court did not abuse its discretion when sentencing McDonnell. Here, the trial court properly demonstrated that the aggravating and mitigating circumstances were weighed to determine that the aggravators outweighed the mitigators. Therefore, we find that the trial court properly evaluated McDonnell's aggravating and mitigating circumstances when it imposed an enhanced sentence.

III. *Appropriateness of the Sentence*

A sentence, which is authorized by statute, will not be revised unless it is inappropriate in light of the nature of the offense and character of the offender. App. R. 7(b); *Rodriguez*, 785 N.E.2d at 1174. As previously mentioned, McDonnell was sentenced to an enhanced sentence of thirty-five years for Voluntary Manslaughter, a Class A felony.

In this case, the nature of the offense was particularly brutal due to the repeated blows to Daniel's face and body, accomplished by use of a mop and kicking. When taking this into account, we conclude that the trial court appropriately considered the nature of the offense when enhancing McDonnell's sentence. *See* App. R. 7(B).

In addition to the traditional consideration of the nature of the offense, we review the sentence to assure that it is constitutionally proportionate to the "character of the offender." *Borton v. State*, 759 N.E.2d 641, 648 (Ind. Ct. App. 2001). Due to his minor criminal history, a history of battering his wife and an alcohol abuse problem leading to many of his rage problems, the trial court imposed a slightly enhanced sentence.

Consequently, based on the character of the offender, we conclude that the trial court's imposition of a modest increase in the presumptive sentence from thirty to thirty-five years is not inappropriate. *See* App. R. 7(B); *see also Rodriguez*, 785 N.E.2d at 1174. Accordingly, we find that the trial court did not abuse its discretion. *See Powell*, 751 N.E.2d at 314.

CONCLUSION

Based on the foregoing, we find that the trial court properly evaluated McDonnell's aggravating and mitigating circumstances, and therefore, the enhanced sentence was not inappropriate.

Affirmed.

KIRSCH, J., and FRIEDLANDER, J., concur.